Supreme Court, U.S.
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No. 91-159

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

IN RE ALAN J. and MARY FRANCES ANTWEIL,
husband and wife,
HOBBS PIPE & SUPPLY, a general partnership,
and MORRIS R. ANTWEIL,
Debtors.

WILLIAM BARNHILL,
Petitioner,

v.

ELLIOT JOHNSON, Trustee,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether, for purposes of establishing a voidable preference under the Bankruptcy Code, 11 U.S.C. § 547(b), when payment is by check, the effective date of transfer is the date the check is delivered to the payee or the date the check is honored by the drawee bank.

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IN THE

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No. ——

IN RE ALAN J. and MARY FRANCES ANTWEIL,
husband and wife,
HOBBS PIPE & SUPPLY, a general partnership,
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On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The April 30, 1991 opinion of the United States Court of Appeals for the Tenth Circuit is reported at *Johnson v. Barnhill (In re Antweil)*, 931 F.2d 689 (10th Cir. 1991), and is reprinted in Appendix A to this Petition. The prior opinion of the United States District Court for the District of New Mexico is reported at *Johnson v. Barn-*

hill (In re Antweil), 111 Bankr. 337 (D.N.M. 1990), and is also reprinted in Appendix B. The prior opinion of the United States Bankruptcy Court for the District of New Mexico is reported at *Johnson v. Barnhill (In re Antweil)*, 97 Bankr. 69 (Bankr. D.N.M. 1989), and is reprinted in Appendix C.

JURISDICTION

The Judgment of the Court of Appeals was entered April 30, 1991. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the Bankruptcy Code, 11 U.S.C. § 547(b) and 11 U.S.C. § 101(54), which provide as follows:

11 USC § 547

. . .

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

The full text of 11 U.S.C. § 547 is set out in Appendix D to this Petition.

11 U.S.C. § 101

(54) "transfer" means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property, including retention of title as a security interest and foreclosure of the debtor's equity of redemption.

STATEMENT OF THE CASE

Alan J. and Mary Frances Antweil, Hobbs Pipe Supply and Morris R. Antweil, (hereinafter referred to as the "Debtors"), filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code on February 18, 1986.

For purposes of proceedings on appeal, the parties have stipulated to the following material facts:

1. Debtors or their agents delivered a check in the amount of $157,149.22 to Petitioner. William Barnhill, or his agents on November 18, 1985;

2. The check was dated November 19, 1985;

3. The drawee bank honored the check on November 20, 1985;

4. The 90th day before the bankruptcy petition was filed was November 20, 1985.

The Respondent Trustee, Elliot Johnson, was appointed on May 15, 1986. On May 12, 1988, the Trustee filed an

adversary proceeding against several parties, including the Petitioner, William Barnhill (hereinafter referred to as "Barnhill"). The Bankruptcy Court's jurisdiction was based on 28 U.S.C. § 1334 and 28 U.S.C. § 157.

The Trustee's Complaint contained in Count I an allegation that Barnhill received a preferential transfer from the Debtors on November 19, 1985. Barnhill filed a Motion to Dismiss the Trustee's Complaint on June 17, 1988. On or about October 6, 1988, the Trustee filed a First Amended Complaint against Barnhill and others, which did not change the material allegations against Barnhill.

On October 13, 1988, Barnhill filed a Motion to Dismiss the First Amended Complaint on the grounds that the transfer did not occur within the ninety day preference period under 11 U.S.C. § 547. A Motion for leave to file a second amended Complaint to recover preferential transfers was filed by the Trustee on or about October 11, 1988. On October 13, 1988, Barnhill filed a Memorandum Brief in opposition to the Trustee's Motion for leave to file second Amended Complaint.

In a Memorandum Opinion issued by the Bankruptcy Court on March 1, 1989, the Court adopted the rule that for purposes of Section 547(b), the effective date of transfer was the date of delivery of the check. *Johnson v. Barnhill (In re Antweil)*, 97 Bankr. 69, 70 (Bankr. D.N.M. 1989). The Bankruptcy Court found that the date on the check and the date the check was delivered were both outside the 90-day preference period and, therefore, the Trustee could not avoid the transfer. 97 Bankr. at 70. The Bankruptcy Court granted Barnhill's Motion to Dismiss and denied the Trustee's Motion for leave to file the proposed Second Amended Complaint. 97 Bankr. at 70.

On March 10, 1989, the Trustee appealed to the District Court from the Bankruptcy Court's March 1, 1989 decision. Following briefing and argument, on February 27, 1990, the District Court entered its Memorandum

Opinion and Order affirming the decision of the Bankruptcy Court. *Johnson v. Barnhill (In re Antweil)*, 111 Bankr. 337 (D.N.M. 1990).

The Trustee filed a Notice of Appeal to the United States Court of Appeals on March 28, 1990. The Court of Appeals, in its opinion of April 30, 1991, reversed the decision of the District Court, holding that, for purposes of 11 U.S.C. § 547(b), a payment made by check is deemed to have occurred when the check is honored by the drawee bank. 931 F.2d 689, 695. The Tenth Circuit found that its prior ruling in *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986), which adopted a date of delivery rule for purposes of Section 547(c), did not control the result in this case, and that a different, date of honor rule should apply to determine the date of transfer under Section 547(b).

REASONS FOR GRANTING THE WRIT

I. THE COURTS ARE DIVIDED ON THE QUESTION

Congress enacted the Bankruptcy Code in 1978, restructuring bankruptcy law and creating a uniform federal statutory structure for debtor relief. A central policy of the Bankruptcy Code is equality of distribution among creditors of equal priority. In furtherance of that policy, 11 U.S.C. § 547(b) provides that a trustee in bankruptcy may avoid certain preferential transfers of an interest in property of the debtor made within 90 days of filing of the bankruptcy petition. *Begier v. Internal Revenue Service*, —— U.S. ——, 110 S.Ct. 2258, 2262 (1990).

The question presented by this case is a question of federal law involving the provisions of § 547(b). The United States Courts of Appeals which have considered the question have rendered conflicting decisions.

The United States Courts of Appeals for the Fourth, Sixth and Ninth Circuits have held that the date of delivery of a check is the date of transfer of an interest

in property of the debtor for purposes of Section 547(b). *Counts v. Wang Laboratories, Inc. (In re Virginia Information Systems)*, 932 F.2d 338 (4th Cir. 1991); *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879 (1990); *Robert K. Morrow, Inc. v. Agri-Beef Co. (In re Kenitra, Inc.)*, 797 F.2d 790 (1986), *cert. denied*, 479 U.S. 1054 (1987).

The United States Court of Appeals for the Tenth Circuit in its decision in this case adopted the rule that transfer by check occurs on the date the check is honored by the drawee bank for purposes of establishing a voidable preference under Section 547(b). In cases decided under the former Bankruptcy Act, the Courts of Appeals for the Eleventh and Seventh Circuits have also decided to adopt a date of honor rule. *Nicholson v. First Investment Co.*, 705 F.2d 410 (11th Cir. 1983); *Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288 (7th Cir. 1974). The Eighth and Third Circuits have additionally indicated, in dicta, that they would apply a date of honor rule. *Kroh Brothers Development Company v. Continental Construction Engineers, Inc. (In re Kroh Brothers Development)*, 930 F.2d 648, 650-51 (8th Cir. 1991); *In re New York City Shoes, Inc.*, 880 F.2d 679, 681 n. 2 (3rd Cir. 1989).

The United States District and Bankruptcy Courts are similarly divided on the question, with the majority of those Courts holding that a date of honor rule should apply, and a minority of the Courts adopting a date of delivery rule. *See* cases cited in *Johnson v. Barnhill (In re Antweil)*, 931 F.2d at 695; *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap)*, 909 F.2d at 884; "Does Payment by Check Constitute A Transfer Upon Delivery or Payment," 64 Am. Bankr. L.J. 93 (1990).

II. THE QUESTION PRESENTED IS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT

The issue raised in this case is one which requires resolution by this Court for a number of reasons.

A. The Need for Uniformity in Application of the Bankruptcy Code

First, the conflict in decisions among the Circuit Courts of Appeals leaves unsettled the question of when a transfer occurs for purposes of § 547(b) when the transfer is made by means of a check. This question is an important one which should be resolved by this Court due to the large number of check transactions involved in most bankruptcy proceedings and due to the need for uniform application of the provisions of the Bankruptcy Code by the Federal Courts. *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70 (1945).

B. The Need for Resolution of the Impact of the Uniform Commercial Code on the Provisions of the Bankruptcy Code

Second, the decision below creates a conflict between the provisions of the Bankruptcy Code and the provisions of the Uniform Commercial Code which should be settled by this Court.

In its decision, the Tenth Circuit relied, in part, on Section 3-409 of the Uniform Commercial Code. *Johnson*, 931 F.2d at 693-94. Section 3-409 states that a check does not operate as an assignment of funds in the hands of the drawee until the drawee accepts the check. The Tenth Circuit reasoned that a date of honor rule was more consistent with Section 3-409, since events occurring between the time of delivery and honor could prevent the transfer. 931 F.2d at 693. The Tenth Circuit decision, then requires that the transfer be absolute and unconditional, where payment is made by check.

In enacting Section 547 of the Bankruptcy Code, Congress intended to make that section more consistent with the Uniform Commercial Code. H.R. No. 595, 95th Cong., 2d Sess. 372, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6238. However, the clear language of Section 101(54) of the Bankruptcy Code defines "transfer" to mean every mode, absolute or conditional, of disposing of an interest in property. The adoption of a date of honor rule based on the provisions of U.S.C. § 3-409 acts as a limitatin on the definition of "transfer" under the Bankruptcy Code by excluding conditional payments by check.

In addition to limiting the definition of "transfer," a date of honor rule based on U.C.C. § 3-409 is also contrary to the expressed intent of Congress in enacting Section 547 of the Bankruptcy Code. In discussing the provisions of 11 U.S.C. § 547(c), Congress recognized modern commercial practice that payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored. Payment is considered to be made when the check is delivered for purposes of Sections 547(c)(1) and (2). 124 Cong. Rec. S17, 414 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini); 124 Cong. Rec. H11, 097 (daily ed. Sept. 28, 1978) (statement of Rep. Edwards).

Treatment of payment by check as a cash transaction [1] unless the check is dishonored is consistent with § 3-503 of the Uniform Commercial Code, which provides that presentment of the check for payment within 30 days is reasonable time for presentment. Congress relied on

[1] A sub-issue present in this case is the question of the effect of post-dating the check. Authorities are split as to the effective date of a post-dated check. *Compare*, H.R. No. 95-595, 95th Cong., 1st Sess. 373-74 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 6329 (postdated check constitutes payment on delivery if it amounts to transfer that is "substantially contemporaneous"), with *Official Unsecured Creditors Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879, 883 (6th Cir. 1990) (postdated check is a credit transaction).

U.C.C. § 3-503 in resolving whether the delay between delivery and payment would defeat the parties' intent of a substantially contemporaneous exchange under 11 U.S.C. § 547(c). S.Rep. No. 989, 95th Cong. 2d Sess. 88, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5874.

The issue raised by the Tenth Circuit's decision of the impact of the Uniform Commercial Code on the voidable preference provision of the Bankruptcy Code is an unsettled issue which should be resolved by this Court.

C. The Need for a Uniform Rule Within Section 547

Last, the decision below expressly creates a different rule for the effective date of transfer for purposes of Section 547(b) than for purposes of Section 547(c) of the Bankruptcy Code.

Section 547(b) of the Code sets out the power of the trustee to avoid preferential transfers within 90 days of filing of the bankruptcy petition. The companion provisions of § 547(c) define certain classes of transfers which are excepted from the trustee's avoidance powers under § 547(b). The Legislative history of the 1978 Bankruptcy Code indicates that the primary purpose of Section 547(b) was to equalize distributions among creditors of equal priority, while the primary purpose of Section 547(c) was to encourage certain creditors to continue dealing with troubled businesses without fear of the trustee's avoidance power.

Based on clear Congressional intent that a date of delivery rule should apply, the courts, including the Tenth Circuit, have uniformly adopted that rule as the effective date of transfer by check for purposes of § 547(c). *See Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986). However, finding that different policy considerations apply to § 547(b), the Court below concluded that the opposite, date of honor, rule should determine the date of transfer under § 547(b).

The result of adopting different rules for the two provisions of § 547 by the Tenth Circuit, as well as the Eighth and Third Circuits, is that two different dates of transfer for payments by check will apply in any preference action involving the two provisions.

CONCLUSION

Three important reasons exist for this Court to resolve the question presented in this case. First, the United States Courts of Appeals have divided on the question, resulting in lack of uniform application of the preference provision of the Bankruptcy Code. Second, conflicts exist between the clear language of the Bankrupcty Code, which defines the term "transfer," Legislative history indicating that the preference provision was intended to be more consistent with the Uniform Commercial Code, and the decision below which effectively re-defines the term "transfer" based on the Uniform Commercial Code. Last, adopting inconsistent rules governing the date of transfer when payment is by check for purposes of Sections 547(b) and 547(c) will result in two different dates of transfer in any preference action involving both provisions of the Code.

WHEREFORE, Petitioner respectfully prays that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 90-2065

IN RE ALAN J. and MARY FRANCES ANTWEIL, husband and wife; HOBBS PIPE & SUPPLY, a general partnership; and MORRIS R. ANTWEIL,
Debtors.

ELLIOTT JOHNSON, Trustee,
Plaintiff-Appellant,
v.

WILLIAM BARNHILL; BRAVO ENERGY; and ESTATE OF MURRAY CASH,
Defendants-Appellees.

Appeal from the United States District Court
for the District of New Mexico
(D.C. No. CV 89-316JP)

[Filed Apr. 30, 1991]

Submitted on the briefs:

William P. Johnson and Andrew J. Cloutier of Hinkle, Cox, Eaton, Coffield & Hensley, Roswell, New Mexico, for Plaintiff-Appellant.

William J. Arland and Emily A. Franke of Butt, Thornton & Baehr, P.C., Albuquerque, New Mexico, for Defendants-Appellees.

Before McKAY, SEYMOUR, and EBEL, Circuit Judges.

McKAY, Circuit Judge.

The parties agree to waive oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1.2. The case is therefore ordered submitted on the briefs.

This case requires us to decide whether, for purposes of establishing a voidable preference under the Bankruptcy Code, 11 U.S.C. § 547(b), the transfer of a check occurs when the check is delivered to the payee or when it is honored by the drawee bank. Because we hold that, for purposes of section 547(b), a payment made by check is deemed to have occurred when the check is honored by the drawee bank, we reverse the district court.

The parties do not dispute the facts of this case. The debtors, Alan J. and Mary Frances Antweil, Hobbs Pipe and Supply, and Morris R. Antweil ("debtors") filed a voluntary petition in bankruptcy under Chapter 11 of the Bankruptcy Code on February 18, 1986. On May 12, 1988, the trustee filed an adversary proceeding against William Barnhill, Bravo Energy Inc., the Estate of Murray Cash, and the Estate of Sol Litt IV (collectively "Barnhill") attempting to recover an alleged preferential transfer under section 547(b) of the Code. The trustee is attempting to recover a sum paid to Barnhill by a check from the debtor dated November 19, 1985. On October 11, 1988, the trustee moved to file a second amended complaint alleging that the debtor delivered the check to Barnhill on November 18, but postdated it to November 19. The drawee bank honored the check on November 20. Barnhill objected to the trustee's request to amend and moved for dismissal.

The 90-day preference period began on November 20. The bankruptcy court held that the transfer occurred on the date the check was delivered, November 18. Thus, the bankruptcy court granted Barnhill's motion to dismiss and denied the trustee's motion to amend the complaint. *Johnson v. Barnhill (In re Antweil)*, 97 Bankr. 69 (Bankr. D.N.M. 1989). The United States District Court for the District of New Mexico affirmed the decision of the bankruptcy court, *Johnson v. Barnhill (In re Antweil)*, 111 Bankr. 337 (D.N.M. 1990), and this appeal followed.

In reviewing this decision, the court applies the same standard of review as that used by the district court. *See, e.g., Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1543, (10th Cir. 1988). The question of the sufficiency of a complaint is a question of law reviewed *de novo*. *Morgan v. City of Rawlins*, 792 F.2d 975, 978 (10th Cir. 1986).

In pertinent part, the Bankruptcy Code allows a trustee to avoid a transfer made to a creditor by the debtor if: (a) the transfer was made to or for the benefit of a creditor; (b) it was for or on account of an antecedent debt owed by the debtor before such transfer was made; (c) it was made while the debtor was insolvent; (d) it was made on or within the 90-day period prior to the filing of the bankruptcy petition; and (e) the transfer enabled the creditor to receive more than he would have otherwise received from the bankruptcy estate. 11 U.S.C. § 547(b).

The only issue in dispute here is whether the transfer by check occurred on or within the 90-day period prior to the filing of the petition. "What constitutes a 'transfer' under § 547(b) and when it is complete . . . is necessarily a federal question, since it arises under a federal statute designed to have uniform application . . . ." *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70 (1945). The parties agree that any transfer taking place on or

after November 20, 1985, falls within the 90-day preference period.

I. THE DISTINCTION BETWEEN 547(b) AND 547(c)

We previously held in another context that a transfer occurs on the date a check is delivered. *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631, 633 (10th Cir. 1986). *In re White River* applies to section 547(c)(2),[1] the "ordinary course of business" exception to the preference provision. However, because the purpose and function of section 547(b) differ from those of section 547(c), *In re White River* and the legislative history upon which it relies[2] do not govern here. *See, e.g., In re New York City Shoes, Inc.*, 880 F.2d 679, 681 n.2 (3d Cir. 1989) (because purposes of sections 547(b) and 547(c) are completely different, definition of "transfer" need not be same for both sections); *Newton Exploration Co. v. Fredman (In re Nucorp Energy, Inc.)*,

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[1] That section states:

> The trustee may not avoid under this section a transfer . . . to the extent that such transfer was (A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee; (B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and (C) made according to ordinary business terms . . . .

11 U.S.C. 546(c)(2) (1988).

[2] In support of our holding in *In re White River*, we relied on the legislative history of subsections 547(c)(1) and (2), in particular the statements of Senator DeConcini and Representative Edwards:

> Contrary to the language contained in the house report, payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored. Payment is considered to be made when the check is delivered for purposes of section 547(c)(1) and (2).

In re White River, 799 F.2d at 633 (quoting 124 Cong. Rec. H11097 (daily ed. Sept. 28, 1978); 125 Cong. Rec. S17414 (daily ed. Oct. 6, 1978)).

92 Bankr. 416, 417 (Bankr. 9th Cir. 1988); *Gold Coast Seed Co. v. Spokane Seed Co. (In re Gold Coast Seed Co.)*, 30 Bankr. 551, 553 (Bankr. 9th Cir. 1983); *Bonapfel v. LaSalle-Deitch Co. (In re All American of Ashburn, Inc.)*, 95 Bankr. 251, 252-53 (Bankr. N.D. Ga. 1989); *TMWC, Inc. v. General Elec. (In re AMWC, Inc.)*, 94 Bankr. 428, 432 (Bankr. N.D. Tex. 1988); *Laird v. Bartolameolli (In re Newman Cor.)*, 83 Bankr. 571, 572 (Bankr. E.D. Wis. 1988); *Chaitman v. Paisano Automotive Liquids, Inc. (In re Almarc Mfg., Inc.)*, 62 Bankr. 684, 687 (Bankr. N.D. Ill. 1986); *Lancaster v. Morristown Block & Concrete Products (In re Compton)*, 55 Bankr. 180, 182-83 (Bankr. E.D. Tenn. 1985). *See also* 4 Collier on Bankruptcy ¶ 547.16 at 547-71 n.27 (15th ed. 1990) (check not necessarily transferred at same time under subsections (b) and (c)(1) of section 547).

The most important purpose of section 547(b) is to facilitate equal distribution of the debtor's assets among the creditors. H.R. Rep. No. 595, 95th Cong., 1st Sess. 177-78, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6138. To accomplish this purpose, Congress has created an arbitrary time period consisting of the 90 days immediately preceding the filing of the bankruptcy petition. 11 U.S.C. § 547(b)(4)(A). Creditors who receive payments on pre-existing debts before this time period begins may keep those payments. However, creditors who receive payments on pre-existing debts within the 90-day period must disgorge those payments so that they may be shared equally with other creditors. In a preference action, "the . . . contest . . . is one between [the transferee] on the one hand, and all of the debtors' unsecured creditors on the other." *Yellowhouse Machinery Co. v. Mack (In re Hughes)*, 704 F.2d 820, 822 (5th Cir. 1983).

The general rules governing preferences are objective and technical. The intent or state of mind of the parties

to a transfer is not material to the general question of whether that transfer is a preference. 4 Collier on Bankruptcy, ¶ 547.01 at 547-12. The district court incorrectly reasoned that a date of delivery rule would effectuate the commercial expectations of the parties to the transfer. However, effectuating the commercial expectations of the parties is simply not a stated goal of the general preference provision, section 547(b). Nor will protecting the expectations of the parties advance the goals of section 547(b) in any way. *In re Nucorp*, 92 Bankr. at 418.

Rather, section 547(b) "is intended to promote the common good of *all* of an estate's creditors . . . ." *In re* Hughes, 704 F.2d at 822 (emphasis in original). The creditors who receive preferential payments are those who extended credit without structuring the transactions to protect themselves against possible bankruptcy. Payment on these debts usually is not made with an eye toward a possible bankruptcy filing 90 days in the future. Thus, the intent of the parties as to when the transfer is deemed completed is irrelevant.

By contrast, the section 547(c) defenses carve out a group of exceptions to 547(b). The purpose of the section 547(c) defenses is to encourage trade creditors and other suppliers of goods and services to continue dealing with troubled businesses without fear of the trustee's avoidance powers. *In re White River*, 799 F.2d at 634. In order to do this, it is important to protect the ordinary commercial expectations of the parties.

For example, section 547(c)(1) prohibits the trustee from avoiding a transfer "intended by the debtor and the creditor . . . to be a contemporaneous exchange for new value given to the debtor," and which is, in fact, substantially contemporaneous. The purchase of goods or services for cash falls within this exception. In this context, it is important to consider that most people view the giving of a check as a cash transaction. A date of delivery rule for a check given as a contemporaneous

exchange for new value conforms to popular expectations and to the legislative history of this section quoted above. The legislative history makes clear, however, that this is an exception to the general rule:

> The first [547(c)] exception is for a transfer that was intended by all parties to be a contemporaneous exchange for new value, and was in fact substantially contemporaneous. *Normally, a check is a credit transaction.* However, for the purposes of this paragraph, a transfer involving a check is considered to be contemporaneous," and if the check is presented for payment within the normal course of affairs . . . that will amount to a transfer that is "in fact substantially contemporaneous."

H.R. Rep. No. 595, 95th Cong. 1st Sess. 373, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6329 (emphasis added).

Similarly, section 547(c)(2) states that a trustee may not avoid a "payment of a debt incurred by the debtor in the ordinary course of business . . . and made according to ordinary business terms." Under this section, a power company, for example, may continue to supply a financially troubled company on condition that the company continue to make regular and timely payments. In order to fit within this exception, a creditor must insist on "timeliness." The intent of a creditor as to when a transfer takes place should be considered for purposes of this defense.

It does not follow, however, that, because a date of delivery rule better serves the purposes of the section 547(c) defenses, such a rule should apply in all preference actions. Because, as we have discussed, a date of honor rule is consistent with the purposes of section 547(b), and because a date of honor rule is more consistent with the Uniform Commercial Code and with judicial

economy, we believe a date of honor rule should apply for purposes of section 547(b).

II. CONFORMITY WITH THE U.C.C.

The legislative history of the Bankruptcy Code states that one purpose of the 1978 reforms was to make bankruptcy law generally more congruent with modern commercial practices, in particular the Uniform Commercial Code. H.R. No. 595, 95th Cong., 2d Sess. 5, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 5966. Conformity with the Uniform Commercial Code was a particular goal of the revision of the preference provision. The legislative history states:

> This section [547] is a substantial modification of present law. It modernizes the preference provisions and brings them more into conformity with commercial practice and the Uniform Commercial Code.

Id. at 372, U.S. Code Cong. & Admin. News at 6328. Furthermore, though the question of when a transfer is complete is a federal question, when there is no controlling federal statute "[t]he state standards which control the effectiveness of a transfer likewise determine the precise time when a transfer is deemed to have been made or perfected." *McKenzie*, 323 U.S. at 369-70. While the legislative history indicates that, for purposes of the § 547(c) defenses, Congress intended a transfer to be complete when a check is delivered, *see In re White River*, 799 F.2d at 633; *Official Unsecured Creditors' Comm. of Belknap, Inc. (In re Belknap, Inc.)*, 909 F.2d 879, 881-82 (6th Cir. 1990), Congress has remained silent as to when a transfer occurs for § 547(b). Thus, we refer to the U.C.C., which has been virtually unanimously adopted by the states, when formulating our answer.

The U.C.C. article governing commercial paper states in pertinent part, "A check or other draft does not of

itself operate as an assignment of any funds in the hands of the drawee available for its payment, and the drawee is not liable on the instrument until he accepts it." U.C.C. § 3-409(1), 2 U.L.A. 176 (1968).[3] Under this provision, no transfer of funds takes place when a check is given. *Accord Klein v. Tabatchnick*, 610 F.2d 1043, 1049 (2d Cir. 1979) (check is merely request to drawee bank to pay funds to payee, not an assignment of funds); M. Bienenstock, *Bankruptcy Reorganization* 389 (1987) (uncertified check is not transfer of funds). As the Eleventh Circuit pointed out, until a check is actually accepted and paid by the drawee bank, another creditor could, for example, prevent the transfer by garnishing the bank account. *Nicholson v. First Inv. Co.*, 705 F.2d 410, 413 (11th Cir. 1983). Likewise, a drawer could stop payment or have insufficient funds. The giving of a check does not ensure that a transfer will ever, in fact, be made. Thus, our holding that, for purposes of section 547(b), a transfer does not occur until the drawee bank honors

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[3] Some courts have erroneously applied section 547(e) to determine when a check is transferred. *See, e.g., McClendon v. Cal-Wood Door (In re Wadsworth Bldg. Components, Inc.)*, 711 F.2d 122, 123 (9th Cir. 1983). Section 547(e) states in pertinent part: "For the purposes of this section . . . a transfer is made . . . at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time . . . ." 11 U.S.C. § 547(e)(2)(A) (1988). The argument is that the honoring of a check by the drawee bank is analogous to perfection. Therefore, if the check is honored within 10 days of execution, the transfer is deemed made when the check is delivered. *See* 4 Collier on Bankruptcy ¶ 547.16 at 547-72; *In re Wadsworth*, 711 F.2d at 123.

We reject this reasoning because section 547(e) deals with security interests, not checks. *See* H. Rep. No. 595, 95th Cong., 2d Sess. 374-75, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6330-31; 4 Collier on Bankruptcy at 547-73; *O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35, 38 (1st Cir. 1984). It is unnecessary and incorrect to analogize to security interests and to U.C.C. Article 9 perfection rules when U.C.C. Article 3 squarely covers commercial paper such as checks.

the check is consistent with the Uniform Commercial Code.

III. EASE OF PROOF

Finally, a date of honor rule is capable of easier proof than a date of delivery rule The date of honor can usually be proven simply by producing a bank statement. By contrast, the date of delivery may not be documented. As in this case, the date of delivery may differ from the date of execution. A date of delivery rule will provide incentives to be untruthful about when delivery occurred.

In reaching this holding, we differ with the Sixth Circuit, which recently adopted a date of delivery rule both for section 547(b) general preferences and the section 547(c) defenses. *Official Unsecured Creditors' Committee of Belknap, Inc. v. Shaler Corp. (In re Belknap, Inc.)*, 909 F.2d 879 (6th Cir. 1990). The Sixth Circuit relied most heavily on the "simplicity" of having a uniform rule for all section 547 questions. *Id.* at 883. However, because the date of honor is capable of much simpler proof, we believe that it serves the interests of judicial economy to use it whenever possible. In this manner, we need only require proof of the date of delivery when a section 547 (c) defense is applicable.

To date, the circuits have split evenly on this issue. Along with the Sixth Circuit, the Ninth Circuit has held that a date of delivery rule applies under Section 547(b). *See Robert K. Morrow, Inc. v. Agri-Beef Co. (In re Kenitra, Inc.)*, 797 F.2d 790, 791 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987). The Seventh and Eleventh Circuits have adopted a date of honor rule for section 547(b). *See Nicholson*, 705 F.2d at 413; *Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288, 1293 (7th Cir. 1979).[4] *See also New York City Shoes*, 880 F.2d at 681

[4] Although *Nicholson* and *Fitzpatrick* were decided under the former Bankruptcy Act, nothing in the current Code suggests a different result.

n.2 (suggesting in dictum that a date of honor rule should apply). By joining the Seventh and Eleventh Circuits in adopting a date of honor rule for section 547(b), we also join the majority of bankruptcy and district courts which have decided this issue. *See, e.g., Chaitman v. Chicago Boiler Co. (In re Almarc Mfg., Inc.)*, 52 Bankr. 582, 583-84 (Bankr. N.D. Ill. 1985); *Kelley v. Citizens & Southern Nat'l Bank (In re Adams)*, 102 Bankr. 271, 273-74 (Bankr. M.D. Ga. 1989); *Putney v. Barnett Bank of Central Fla. (In re W & T Enters., Inc.)*, 84 Bankr. 838, 839 (Bankr. M.D. Fla. 1988); *In re All American of Ashburn*, 95 Bankr. at 252; *In re AMWC*, 94 Bankr. at 432; *In re Newman*, 83 Bankr. at 573; *Cimmaron Oil Co. v. Schlumberger Well Services, Inc. (In re Cimmaron Oil Co., Inc.)*, 88 Bankr. 103, 104-05 (N.D. Tex. 1987); *Tolz v. Double Envelope Corp. (In re Sunup/Sundown, Inc.)*, 65 Bankr. 696, 697 (Bankr. S.D. Fla. 1986); *In re Compton*, 55 Bankr. at 182; *LaBarge v. Tubular Steel, Inc. (In re Midwest Boiler & Erectors, Inc.)*, 54 Bankr. 793 (Bankr. E.D. Mo. 1985); *Remes v. Acme Carton Corp. (In re Fasano/Harriss Pie Co.)*, 43 Bankr. 871 (Bankr. W.D. Mich. 1984), *aff'd* 71 Bankr. 287 (W.D. Mich. 1987); *In re Video East, Inc.*, 33 Bankr. 61, 62-63 (Bankr. E.D. Pa. 1983).

IV. CONCLUSION

Because we conclude that the transfer at issue here occurred when the check was honored by the drawee bank and was thus within the 90-day voidable preference period, we REVERSE the district court and hold that the trustee may avoid the transfer.

The trustee attempted to amend his complaint to allege the three discrete dates of the transaction at issue. The bankruptcy court denied the motion to amend. The district court affirmed this denial because, having held that the transfer occurred upon delivery, any amendment of the complaint would have been futile. *In re Antweil*, 111

Bankr. at 342. Because of our disposition of this case, we also REVERSE the denial of the trustee's motion to amend.

The judgment of the United States District Court for the District of New Mexico is REVERSED, and this case is REMANDED for proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

CIV No. 89-0316-JP

(Appeal from U.S. Bankruptcy Court)

IN RE: ALAN J. and MARY FRANCES ANTWEIL, husband and wife, HOBBS PIPE AND SUPPLY, a general partnership, MORRIS R. ANTWEIL,

Debtors.

ELLIOTT JOHNSON,
Plaintiff/Appellant,

vs.

WILLIAM BARNHILL,
Defendant/Appellee.

MEMORANDUM OPINION AND ORDER

[Filed Feb. 27, 1990]

The subject of this Memorandum Opinion and Order is an appeal from two orders of the United States Bankruptcy Court filed on March 1, 1989. The first order granted a motion brought by William Barnhill (appellee) to dismiss Johnson's First Amended Complaint. The second order denied a motion brought by Elliott Johnson (appellant/trustee) to file a Second Amended Complaint.[1]

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[1] Johnson additionally appealed an earlier order entered by the Bankruptcy Court on October 24, 1988. That order found that the appropriate method to count days for purposes of the 90-day pref-

Having considered the briefs and record on appeal, and having consulted the applicable authorities, I conclude that both the "Order Dismissing Defendant Barnhill" and the "Order Denying Plaintiff's Motion To File A Second Amended Complaint" should be affirmed.

BACKGROUND

The following facts were ascertained by reference to the briefs submitted by the parties and the record on appeal.

1. On February 18, 1986, Alan J. and Mary Frances Antweil, Hobbs Pipe and Supply, and Morris R. Antweil (deceased) (the "debtors") filed voluntary petitions under Chapter 11 of the Bankruptcy Code.

2. On May 15, 1986, Elliott Johnson (the "Trustee") was appointed trustee of the bankruptcy estates.

3. On May 12, 1988, Trustee filed an adversary proceeding to recover alleged preferential transfers. In Count I of his Complaint, Trustee alleged that Barnhill had received a preferential transfer in the amount of $157,149.22 in the form of a check dated November 19, 1985.

4. On June 17, 1988, Barnhill filed a Motion To Dismiss the Trustee's Complaint.

5. On October 6, 1988, Trustee filed a First Amended Complaint. The parties agree that none of the amendments contained in this complaint affected the allegations against Barnhill contained in the original complaint.

6. On October 11, 1988, Trustee filed a "Motion For Leave To File Second Amended Complaint To Recover

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erence period under 11 U.S.C. § 547(b)(4)(A) is backwards from the date of filing of a bankruptcy petition. *See Johnson v. Barnhill (In re Antweil)*, 97 B.R. 63, 64 (Bkrtcy.D.N.M. 1988). On March 27, 1989, this order was affirmed by the District Court (Burciaga, J.) (CIV 88-1313-JB) and is therefore not at issue in this appeal.

Preferential Transfers." This proposed amended complaint alleged that the check at issue "was delivered to William Barnhill and/or his agents on November 18, 1985, . . . postdated to November 19, 1985, and . . . honored by the drawee on November 20, 1985." Record On Appeal at 27.

7. On October 13, 1988, Barnhill filed a Motion To Dismiss the First Amended Complaint and an "Objection To Motion For Leave To File Second Amended Complaint To Recover Preferential Transfers."

8. On March 1, 1989, the Bankruptcy Court granted Barnhill's motion to dismiss the First Amended Complaint and denied Trustee's motion for leave to file a Second Amended Complaint. (*Johnson v. Barnhill (In re Antweil)*, 97 B.R. 69 (Bkrtcy.D.N.M. 1989)).

9. On March 10, 1989, Trustee filed a Notice of Appeal to this Court.

DISCUSSION

This Court has jurisdiction pursuant to 28 U.S.C. § 158(a). Because this appeal presents a pure question of law, the bankruptcy court's decision will be reviewed *de novo*. *See Branding Iron Motel, Inc. v. Sandlian Equity, Inc. (In re Branding Iron Motel, Inc.)*, 798 F.2d 396, 399-400 (10th Cir. 1986) (citing *Richmond Leasing Co. v. Capital Bank, N.A.*, 762 F.2d 1303, 1307 (5th Cir. 1985) (per curiam)).

The underlying issue in this appeal is the applicable date of transfer of debtors' check to Barnhill for purposes of the 90-day preference period under 11 U.S.C. § 547(b)(4)(A).[2] The parties have stipulated that

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[2] 11 U.S.C. § 547(b)(4)(A) provides in relevant part:

> Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property . . . made . . . on or within 90 days before the date of the filing of the petition . . . .

Barnhill received the check at issue on November 18, 1985 and the check was dated and deposited on November 19, 1985. Additionally, the parties appear to agree that the drawee bank honored the check on November 20, 1985.[3]

Trustee contends the Bankruptcy Court erred by finding that the applicable date for transfer of a check under section 547(b)(4)(A) is the date of delivery rather than the date the drawee bank honors the check. Alternatively, Trustee contends the Bankruptcy Court erred by finding that this date of delivery rule also applies to postdated checks. I disagree with both of these contentions.

A. *Applicable Date of Transfer of Debtors' Check*

The Bankruptcy Court properly relied on the Tenth Circuit decision in *Bernstein v. RJL Leasing (In re White River Corp.)*, 799 F.2d 631 (10th Cir. 1986). *White River* held that, for purposes of the exception under 11 U.S.C. § 547(c)(2) to a section 547(b) preference action, a transfer occurs upon delivery of a check. *Id.* at 633. Based on *White River*, the Bankruptcy Court found "that the date of delivery rule should apply to [section]

[3] The Bankruptcy Court took judicial notice of the fact that the 90th day before the bankruptcy petition was filed was November 20, 1985. *See Antweil*, 97 B.R. at 70. Neither party has contested this finding on appeal. Thus, based on this finding, only a transfer taking place on November 20, 1985 or later would fall within the 90-day preference period established by section 547(b)(4)(A). Moreover, Trustee alleged in his Second Amended Complaint that the check was honored on November 20, 1985. For purposes of this appeal, I will therefore accept as true that the check was honored by the drawee bank on November 20, 1985. *See Shoultz v. Monfort of Colorado, Inc.*, 754 F.2d 318, 321 (10th Cir. 1985) (material allegations of complaint accepted as true for purposes of appeal (citing *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp.*, 382 U.S. 172, 174-75 (1965))), *cert. denied*, 475 U.S. 1044 (1986).

547(c) defenses thereto." *Johnson v. Barnhill (In re Antweil)*, 97 B.R. 69, 70 (Bkrtcy.D.N.M. 1989).

Trustee does not contest *White River's* validity but rather contends that *White River's* date of delivery rule should be limited to section 547(c) defenses and a date of honor rule should apply to preference actions under 547(b). In support of this contention, Trustee relies on numerous authorities that hold that a date of honor rule controls for purposes of section 547(b). *See, e.g., Remes v. Acme Carton Corp. (In re Fasano/Harriss Pie Co.)*, 43 B.R. 871, 873 (Bkrtcy.W.D.Mich. 1984) (citing cases).

While acknowledging a split of authority on this issue,[4] I am nevertheless persuaded that a date of delivery rule should apply to both preference actions and defenses under section 547 of the Bankruptcy Code. First, the majority of the federal courts of appeals that have considered the section 547 transfer by check issue have applied a transfer on delivery rule. *See Braniff Airways, Inc. v. Midwest Corp.*, 873 F.2d 805 (5th Cir. 1989); *Durham v. Smith Metal and Iron Co. (In re Continental Commodities, Inc.)*, 841 F.2d 527, 530 (4th Cir. 1988); *Kupetz v. Elaine Monroe Associates, Inc. (In re Wolf & Vine)*, 825 F.2d 197, 201 (9th Cir. 1987); *White River*, 799 F.2d at 633; *Ray v. Security Mutual Finance Corp. (In re Arnett)*, 731 F.2d 358, 361 (6th Cir. 2984); *O'Neill v. Nestle Libbys P.R., Inc.*, 729 F.2d 35, 38 (1st Cir. 1984).[5] *But see Nicholson v. First Investment Co.*, 705 F2d 410, 413 (11th Cir. 1983) (applying date of honor rule for transfer of check under prior Bankruptcy Act); *Fitzpatrick v. Philco Finance Corp.*, 491 F.2d 1288, 1293 (7th Cir. 1974) (same). Second, the Ninth Circuit, the only circuit that has to date decided the transfer

[4] *See White River*, 799 F.2d at 633 (recognizing split of authority on issue of when a transfer by check occurs).

[5] *See also Amarex, Inc. v. Marathon Oil Co. (In re Amarex, Inc.)*, 88 B.R. 362, 364-65 (W.D.Okl. 1988).

issue under section 547(b), has held that a transfer on delivery rule applies under both the 90-day preference period defined in section 547(b)(4)(A) and the within 45-day exception provided by section 547(c)(2).[6] *See Wolf & Vine*, 825 F.2d at 201.

Finally, a transfer on delivery rule under section 547(b) is in accord with much of the legislative history and policy objectives noted by the Tenth Circuit in *White River* under section 547(c). For example, *White River* cited legislative history which stated that "payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored." 799 F.2d at 633 (quoting 125 Cong.Rec. H 11097 (daily ed. Sept. 28, 1978); 125 Cong.Rec. S 17414 (daily ed. Oct. 6, 1978) (statements of Rep. Edwards and Sen. DeConcini)). *White River* further noted that "in the commercial world receipt of a check, as distinguished from the date it clears the drawee bank, is customarily looked upon as the date of payment of an obligation." *Id.* at 634. (quoting *Young Supply Co. v. McLouth Steel Corp.*, 55 B.R. 356, 357 (E.D.Mich. 1985)). The Tenth Circuit additionally rea-

[6] Trustee claims that the Ninth Circuit's position on this issue "is increasingly being questioned within that Circiut." Appellant's Reply Brief at 7. To support this claim, Trustee cites a decision of the Bankruptcy Appellate Panel of the Ninth Circuit that states that a date of delivery rule should only apply to section 547(c) defenses and not to preference actions under section 547(b). *See Newton Exploration Co., Inc. v. Fredman (In re Nucorp Energy, Inc.)* 92 B.R. 416, 417 (9th Cir.BAP 1988). As the concurring opinion in *Nucorp* points out, however, the rule proffered by the majority is dictum in that the court held that the transfer by check at issue in that case occurred within the 90-day preference period whether a date of delivery or a date of honor rule was applied. *See id.* at 419 (Perris, J., concurring). Moreover, the Ninth Circuit cases that have applied a date of delivery rule to both subsections are controlling law. *See id.* (citing *Wolf & Vine*, 825 F.2d at 201; *Robert K. Morrow, Inc. v. Agri-Beef Co. (In re Kenitra, Inc.)*, 797 F.2d 790, 791 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)). For these reasons, I decline to adopt the approach proffered by the *Nucorp* court.

soned that a transfer on delivery rule would allow the debtor rather than the bank "to determine the precise date of transfer" *Id.*

Thus, much of the Tenth Circuit's rationale for a transfer on delivery rule under section 547(c) is equally applicable to preference actions as defined in section 547(b)(4)(A). I therefore decline to apply a different time of transfer rule for these two subsections of the Act.[7]

B. *Applicable Date of Transfer for Postdated Checks*

The Bankruptcy Court held that the date of delivery rule should also apply to postdated checks and defined "delivery" as "the later of the date a check is received or dated." *Antweil*, 97 B.R. at 70. In so holding, the Bankruptcy Court relied on *White River* which stated that one purpose for adopting a date of delivery rule "was to allow the debtor, as opposed to a bank, to determine the 'precise date of transfer.'" *Id.* (quoting *White River*, 799 F.2d at 634).

Trustee contends that an exception to the transfer on delivery rule should apply to checks that are postdated. Trustee urges the Court to adopt a date of honor rule for postdated checks that would make the applicable date of transfer of a postdated check for purposes of section 547(b) the date the drawee bank honors the check. Applied to the present cast, such a rule would deem debtors'

[7] The Tenth Circuit specifically conditioned the date of delivery rule to checks that are presented for payment within 30 days, the "period deemed reasonable under the U.C.C.," and that are honored upon presentment. *See White River*, 799 F.2d at 634 (quoting *O'Neill*, 729 F.2d at 38). Here, it is undisputed that the check was delivered on November 18, 1985 and deposited one day later on November 19, 1985. As previously indicated, I also accept as true that the check was honored on November 20, 1985. *See* n.3, *supra*. I find, therefore, that the time period between delivery and presentment was reasonable and that the check was honored upon presentment to the bank. The date of delivery rule should therefore apply.

check transferred on November 20, 1985, making the transfer fall within the 90-day preference period and thus subject to avoidance by Trustee.

I find Trustee's authority for application of a date of honor rule for postdated checks unpersuasive. Trustee's principal authority, *O'Donnell v. Progroup, Inc. (In re Bob Grissett Golf Shoppes, Inc.)*, 78 B.R. 787 (Bkrtcy. E.D.Va. 1987), held that, "for the purpose of section 547(c)(4), the event of a transfer occurs when a check is delievered and subsequently honored only if the parties intended to rely on the check as a cash transaction and such reliance was reasonable under the circumstances. Otherwise the transfer occurs when the check is honored." *Id.* at 792.

Grissett involved 11 postdated checks that were, except for two, all dishonored by the bank. *See id.* at 789. The *Grissett* court found that, based on the fact that the checks were postdated and intended for antecedent debt, "the parties clearly did not intend a cash transaction." *Id.* at 792. As a result, the court found that "the transfers were effective only when the checks were honored." *Id.*

Grissett, however, is factually distinguishable from the present case. First, dishonored checks are expressly excepted from application of the transfer on delivery rule by the applicable governing authorities. *See, e.g., White River*, 799 F.2d at 634 ("[a] check must be . . . honored upon presentment in order for the delivery date to be considered the time of transfer"). Second, the *Grissett* court in an earlier opinion held that a date of *honor* rule applies generally to check transfers under section 547(b). *See Grissett*, 78 B.R. at 791 (citing *Bob Grissett Golf Shoppes, Inc., v. Pro Group, Inc. (In re Bob Grissett Golf Shoppes, Inc.)*, 34 B.R. 320, 322 (Bkrtcy.E.D.Va. 1983)). Thus, I am reluctant to rely on the holding in *Grissett* since, unlike the majority of the checks involved in that case, the check at issue here was in fact honored

by the bank. Moreover, I have previously held that a date of *delivery* rather than a date of honor rule should apply generally to check transfers under section 547(c).

Nevertheless, I find that the approach adopted by the *Grissett* court is applicable to this case. A date of delivery rule for postdated checks that are subsequently honored, provided the parties intend to rely on the check as a cash transaction, is the approach taken by a number of courts and is in accord with the Tenth Circuit's policy of allowing the debtor to determine the "precise date of transfer." *White River*, 799 F.2d at 634. *See, e.g., New York City Shoes, Inc. v. Bentley International, Inc. (In re New York City Shoes, Inc.)*, 880 F.2d 679 (3d.Cir. 1989) (date of postdated check is date of delivery provided creditor can demonstrate that parties intended cash transaction);[8] *Global International Airways Corp. v. Evergreen Air Center, Inc. (In re Global International Airways Corp.)*, 80 B.R. 990, 995 n.9 (Bkrtcy.W.D.Mo. 1987) (postdated check constitutes payment on date of delivery if it amounts to transfer that is "substantially contemporaneous" (quoting H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 373-374 (1977), U.S.Code Cong. & Admin.News 1978, pp. 5787, 6329)); *Grissett*, 78 B.R. at 792. *But see Alkap, Inc. v. John J. Demarest Supply Co., Inc. (In re Alkap, Inc.)*, 54 B.R. 151, 154 (Bkrtcy. D.N.J. 1984) (postdated check akin to promissory note

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[8] The Third Circuit in *New York City Shoes* created a presumption that postdated checks are transferred for purposes of section 547(c)(4) *either* on the date on the face of the check *or* on the date the check is honored by the bank. 880 F.2d at 679. The court further held that this presumption could be rebutted if the creditor could demonstrate that the parties intended a cash transaction. *Id.* If successfully rebutted, the court then held that a transfer on delivery rule should apply. *Id.* The court declined to resolve the question, however, of whether a postdated check will be presumed transferred on the date the check is dated or the date the check is honored if the presumption is not successfully rebutted because resolution of that issue would not have made a difference to the result in the case. *See id.* at 684.

in that both constitute mere promise to pay); *Weill v. Evans Lumber Co., Inc. (In re Johnson)*, 25 B.R. 889, 897 (Banktcy.E.D.Tenn. 1982) (creditor precluded from treating postdated check as cash payment).

It is undisputed that the check at issue here was delivered on November 18, 1985 and dated and deposited on November 19, 1985. I also accept as true that the check was honored on November 20, 1985. *See* n.3, *supra.* Thus, only one-day lapses existed between the time the check was delivered, dated and deposited, and ultimately cleared by the bank. I therefore find that the debtors' check to Barnhill was intended as a cash payment in that "the postdating did not relate to the time of intended payment, but only to the time of presentment to the bank." *Global International*, 80 B.R. at 995.

Accordingly, I find that the applicable date of transfer of the debtors' postdated check to Barnhill was the date of the delivery of the check. Although the Bankruptcy Court defined "delivery" to be the later of the date the check is received or dated, I decline to resolve this issue because both the date of receipt of the check (November 18, 1985) and the date on the face of the check (November 19, 1985) fall outside the 90-day preference period as defined in section 547(b)(4)(A).

CONCLUSION

I find that debtors' postdated check was transferred to Barnhill for purposes of section 547(b) of the Bankruptcy Code on the date it was delivered, in this case either on November 18 or November 19, 1985. Since both of these dates fall outside the 90-day preference period as defined in section 547(b)(4)(A), they are not avoidable preferences and the Bankruptcy Court's dismissal of Trustee's First Amended Complaint should therefore be affirmed.

Although amendments to complaints "shall be freely given when justice so requires," Fed.R.Civ.P. 15(a), Trustee's Second Amended Complaint also would not survive a motion to dismiss. It would therefore be futile to allow the amendment. *See Weatherhead v. Globe International, Inc.*, 832 F.2d 1226, 1228 (10th Cir. 1987) (dismissal of complaint proper if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief") (quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). The Bankruptcy Court's denial of Barnhill's motion to file a Second Amended Complaint should also be affirmed. Therefore,

IT IS BY THIS COURT ORDERED that:

(1) the "Order Dismissing Defendant Barnhill" is AFFIRMED;

(2) the "Order Denying Plaintiff's Motion To File A Second Amended Complaint" is AFFIRMED.

/s/ James A. Parker
United States District Judge

APPENDIX C

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT 0F NEW MEXICO

Jointly administered under No. 11-86-00254 M A

IN RE ALAN J. ANTWEIL and MARY FRANCIS ANTWEIL,
HOBBS PIPE AND SUPPLY, a general partnership,
MORRIS R. ANTWEIL,
Debtors.

Adversary 88-0136 M

ELLIOTT JOHNSON, trustee,
Plaintiff,
v.
WILLIAM BARNHILL, BRAVO ENERGY, INC., and
GOLDIE CASH as personal representative of
the Estate of Murray M. Cash,
Defendants.

MEMORANDUM OPINION

[Filed Mar. 1, 1989]

This matter came before the Court for hearing on plaintiff's motion to file a second amended complaint and the objection thereto by defendant Barnhill. Having considered the arguments of counsel and the letter memoranda submitted therewith, and being otherwise fully informed, the Court finds the objection well taken.

> Although amendments to complaints should be freely permitted when justice so requires, *see* Fed.R.Civ.

> P. 15(a); *Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962); *S.S. Silberblatt, Inc. v. East Harlem Pilot Block-Building 1 Housing Development Fund Company*, 608 F.2d 28, 41 (2d Cir. 1979), it would be an exercise in futility to allow an amendment when the new complaint would not survive a motion to dismiss. *See* J. Moore, 3 *Moore's Federal Practice* ¶ 115.08[4] (2d ed. 1985); *Freeman v. Marine Midland Bank*, 494 F.2d 1334, 1338 (2d Cir. 1974); *Vibrant Sales, Inc. v. New Body Boutique, Inc., 105 F.R.D. 553 (S.D.N.Y. 1985).*

In re Sattler's Inc., 73 B.R. 780, 785 (Bankr. S.D.N.Y. 1987).

Plaintiff's proposed second amended complaint is identical to the first, with one exception; it adds paragraph 7 to Count I against Barnhill that states:

> Alternatively, the transfer from debtors to William Barnhill was made on November 20, 1985. On information and belief, the trustee states that the check attached hereto as exhibit A was delivered to William Barnhill and/or his agents on November 18, 1985, said check was postdated to November 19, 1985, and said check was honored by the drawee on November 20, 1985.

Taking judicial notice of the file the Court finds that the 90th day before the bankruptcy petition was filed is November 20, 1985.

In an earlier order entered in this case the Court ruled that the appropriate way to count days for purposes of the 90 day preference period is backwards from the date of the petition. *Johnson v. Barnhill (In re Antweil)* Adv. No. 88-0316 M (Bankr. D. N.M. Oct. 24, 1988). That order also found the case of *In re White River Corporation*, 799 F.2d 631 (10th Cir. 1986) binding. That case states that the date of delivery of a check is the date of transfer if the check is presented for payment within 30 days and honored.

Trustee makes two arguments to support amending the complaint: first, that the date of delivery rule should not apply to post-dated checks and, second, that the date of delivery rule only applies to Bankruptcy Code § 547(c) defenses, not § 547(b) preference actions. Each will be discussed in turn.

The Court finds that the date of delivery rule should apply to post-dated checks. The date of delivery rule is the method adopted by the Court of Appeals for the Tenth Circuit to determine when a transfer made by check occurs. *In re White River*, 799 at 633. One purpose stated by the Court in adopting that rule was to allow the debtor, as opposed to a bank, to determine the "precise date of transfer." *Id.* at 634. By defining "delivery" to be the later of the date a check is received or dated will further that purpose. This interpretation will also comport with the state law treatment of post-dated checks.[1]

The Court also finds that the date of delivery rule should apply to § 547(b) preference actions as well as to § 547(c) defenses thereto. First, *White River* held that "a transfer occurs upon delivery" and rejected the argument that a transfer occurred on the date a check was honored. 799 F.2d at 633. The trustee makes the same argument in this case.

Second, the Court finds no good reason to view a single transaction differently depending on which subsection of the statute is being read. Finally, in this case the date on the check and the date the check was delievered to

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[1] Section 55-3-114 N.M.S.A. provides, in part:

(1) The negotiability of an instrument is not affected by the fact that it is undated, antedated, or postdated.

(2) Where an instrument is antedated or postdated the time when it is payable is determined by the stated date if the instrument is payable on demand or at a fixed period after date.

Barnhill are both outside the 90 day preference period. This does not seem to be the type of situation Congress intended to cover when it passed section 547. *See* 124 Cong. Rec. S17414 (daily ed. Oct. 6, 1978) ("Payment of a debt by means of a check is equivalent to a cash payment, unless the check is dishonored.")

Therefore, if the Court granted the plaintiff's motion to file a second amended complaint that complaint would not survive a motion to dismiss. Plaintiff's motion will be denied.

In the October 24, 1988 order entered in this case the Court granted all pending motions to dismiss except Barnhill's and reserved ruling on the Barnhill motion pending the outcome of plaintiff's motion to amend the complaint. For the reasons set forth in the October 24, 1988 order the Court now finds Barnhill's motion to dismiss well taken.

An appropriate order shall enter.

/s/ Mark B. McFeeley
MARK B. MCFEELEY
United States Bankruptcy Judge

I certify that on the above stamped date I mailed a copy of the above to:

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/s/ Dinah N. Martinez
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APPENDIX D

STATUTES INVOLVED

11 USC § 547

§ 547. Preferences.

(a) In this section—

(1) "inventory" means personal property leased or furnished, held for sale or lease, or to be furnished under a contract for service, raw materials, work in process, or materials used or consumed in a business, including farm products such as crops or livestock, held for sale or lease;

(2) "new value" means money or money's worth in goods, services, or new credit, or release by a transferee of property previously transferred to such transferee in a transaction that is neither void nor voidable by the debtor or the trustee under any applicable law, including proceeds of such property, but does not include an obligation substituted for an existing obligation;

(3) "receivable" means right to payment, whether or not such right has been earned by performance; and

(4) a debt for a tax is incurred on the day when such tax is last payable without penalty, including any extension.

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property—

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made—

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if—

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

(c) The trustee may not avoid under this section a transfer—

(1) to the extent that such transfer was

(A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and

(B) in fact a substantially contemporaneous exchange;

(2) to the extent that such transfer was—

(A) in payment of a debt incurred by the debtor in the ordinary course of business or financial affairs of the debtor and the transferee;

(B) made in the ordinary course of business or financial affairs of the debtor and the transferee; and

(C) made according to ordinary business terms;

(3) that creates a security interest in property acquired by the debtor—

(A) to the extent such security interest secures new value that was—

(i) given at or after the signing of a security agreement that contains a description of such property as collateral;

(ii) given by or on behalf of the secured party under such agreement;

(iii) given to enable the debtor to acquire such property; and

(iv) in fact used by the debtor to acquire such property; and

(B) that is perfected on or before 10 days after the debtor receives possession of such property;

(4) to or for the benefit of a creditor, to the extent that, after such transfer, such creditor gave new value to or for the benefit of the debtor—

(A) not secured by an otherwise unavoidable security interest; and

(B) on account of which new value the debtor did not make an otherwise unavoidable transfer to or for the benefit of such creditor;

(5) that creates a perfected security interest in inventory or a receivable or the proceeds of either, except to the extent that the aggregate of all such transfers to the transferee caused a reduction, as of the date of the filing of the petition and to the prejudice of other creditors holding unsecured claims, of any amount by which the debt secured by such security interest exceeded the value of all security interests for such debt on the later of—

(A) (i) with respect to a transfer to which subsection (b) (4) (A) of this section applies, 90 days before the date of the filing of the petition; or

(ii) with respect to a transfer to which subsection (b) (4) (B) of this section applies, one year before the date of the filing of the petition; or

(B) the date on which new value was first given under the security agreement creating such security interest;

(6) that is the fixing of a statutory lien that is not avoidable under section 545 of this title; or

(7) if, in a case filed by an individual debtor whose debts are primarily consumer debts, the aggregate value of all property that constitutes or is affected by such transfer is less than $600.

(d) The trustee may avoid a transfer of an interest in property of the debtor transferred to or for the benefit of a surety to secure reimbursement of such a surety that furnished a bond or other obligation to dissolve a judicial lien that would have been avoidable by the trustee under subsection (b) of this section. The liability of such surety under such bond or obligation shall be discharged to the extent of the value of such property recovered by the trustee or the amount paid to the trustee.

(e) (1) For the purposes of this section—

(A) a transfer of real property other than fixtures, but including the interest of a seller or purchaser under a contract for the sale of real property, is perfected when a bona fide purchaser of such property from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest that is superior to the interest of the transferee; and

(B) a transfer of a fixture or property other than real property is perfected when a creditor on a simple contract cannot acquire a judicial lien that is superior to the interest of the transferee.

(2) For the purposes of this section, except as provided in paragraph (3) of this subsection, a transfer is made—

(A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 10 days after, such time;

(B) at the time such transfer is perfected, if such transfer is perfected after such 10 days; or

(C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of—

(i) the commencement of the case; or

(ii) 10 days after such transfer takes effect between the transferor and the transferee.

(3) For the purposes of this section, a transfer is not made until the debtor has acquired rights in the property transferred.

(f) For the purposes of this section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.

(g) For the purposes of this section, the trustee has the burden of proving the avoidability of a transfer under subsection (b) of this section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under subsection (c) of this section.